

1 MICHAEL J. O'TOOLE (SBN 97779) City Attorney
2 RANDOLPH S. HOM (SBN 152833)
3 Assistant City Attorney
4 CITY OF HAYWARD
5 777 "B" Street
6 Hayward, California 94541
7 Telephone: (510) 583-4450
8 Facsimile: (510) 583-3660

9 Attorneys for Defendants City of Hayward,
10 Lloyd Lowe, and Jason Corsolini

11 UNITED STATES DISTRICT COURT
12
13 NORTHERN DISTRICT OF CALIFORNIA

14 MARIA JOYA, individually, and as
15 Administrator of the Estate of NASIR SOLIS,

Case No.: C 07 04739 (SI)

16 Plaintiffs,

17 -vs-

18 CITY OF HAYWARD, a municipal corporation;
19 LLOYD LOWE, in his capacity as Chief of
20 Police for the CITY OF HAYWARD; JASON
21 CORSOLINI, individually and in his capacity as
22 an officer of the HAYWARD POLICE,

DEFENDANTS' OPPOSITION TO
ADMINISTRATIVE MOTION TO
DETERMINE WHETHER CASES
SHOULD BE RELATED; REQUEST FOR
JUDICIAL NOTICE; DECLARATION OF
RANDOLPH S. HOM; (PROPOSED)
ORDER

DATE: N/A
TIME: N/A
CRTRM: N/A

23 Defendants.
24 _____/

25 **DEFENDANTS' OPPOSITION**

26 Plaintiff, Maria Joya, asserts that the within action should be related to Saleh Ali v. City
27 of Hayward, et al., United States District Court Case No. C 07-04718 (CRB) [formerly assigned
to Magistrate Judge Edward M. Chen], and that the actions should be consolidated with the Ali

1 matter serving as the lead case.¹ Interestingly, Joya is the surviving mother of the decedent, Nasir
 2 Solis, and Ali is his surviving father. Significantly, Civil L.R. 3-12 provides that the within
 3 motion must be filed in the earliest-filed case (but does not deem that the earliest-filed case shall
 4 serve as the lead case).

5 Conveniently, Joya fails to apprise the court of the following salient facts. On September
 6 12, 2007, Ali hand-filed his complaint and the case was initially assigned to Magistrate Judge
 7 Edward M. Chen.² On September 13, 2007, **Joya e-filed her complaint, which is a verbatim**

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 9 ¹It should be noted that Joya fails to attach a proposed order to her motion; see also Joya
 10 and Ali's respective positions on the issue of relatedness and consolidation in the Joint Case
 11 Management Conference Statements filed in each case. Plaintiff Ali asserts in pertinent part that,
 12 "Both parties agree that this case and the related case, *Joya v. City of Hayward et al.*, US Dis.
 13 Court Case No. C 07-04739 (SI) (the "Related Action") should be consolidated. Plaintiff believes
 14 that the Related Action should be consolidated with this action with Honorable Judge Breyer
 15 presiding over the two cases since this action was filed earlier than the Related Action.
 16 Nonetheless, Defendants argue that this case should be related to the Related Action with
 17 Honorable Judge Illston presiding over the two cases. On December 10, 2007, Maria Joya,
 18 plaintiff in the Related Action (C 07-04739), filed Notice and Administrative Motion to
 19 Determine Whether Cases Should be Related indicating that the Related Action should be related
 20 to this case.

21 **The present action was filed *before* the Related Action, thus it is the "earliest-**
 22 **filed case" within the meaning of Northern District's Local Rule §3.12 and should,**
 23 **therefore, become the leading case in a situation of two related actions as presented here.**
 24 Further, the present action was served on Defendants by personal service on September 25, 2007
 25 while the Related Action was served on Defendants on September 28, 2007. Thus, the fact that
 26 Defendants filed an Answer to this action only after an Answer was filed to the Related Action,
 27 does not indicate any "priority" but merely the failure of the Defendants to timely respond to this
 action. Further, this case was assigned to Honorable Judge Breyer only after the Defendants
 declined to proceed with the case before Honorable Magistrate-Judge Chen on October 31, 2007.
The Defendants took a calculated risk when declining to proceed before Magistrate Judge
Chen and it appears that they are unsatisfied with the result and are making a second
attempt to shop for a "better" forum. Plaintiff's counsel offered Defendants counsel to
 stipulate for a consolidation as early as November 8, 2007. On November 28, 2007, counsel for
 Defendants advised Plaintiff's Counsel that they insist on consolidation with Judge Illston
 presiding over the two cases. On the same day, November 28, 2007, Plaintiff's counsel asked
 Defendants to reconsider their position in light of the timing of the filing of the two cases vis-à-
 vis Rule §3.12, but this offer was also rejected by Defendants' counsel.

24 The Plaintiff will seek a ruling on this issue on the Case Management Conference set
 25 for December 21, 2007. ..." (See Joint Case Management Conference Statement in Ali, 6:9-7:16)

26 ²Civil L. R. 73-1(a)(1) provides in pertinent part: "**Parties must** either file written
 27 consent to the jurisdiction of the magistrate judge, or **request reassignment to a district judge,**
by the deadline for filing the initial case management conference statement." In this regard,
Magistrate Judge Chen set a deadline of December 12, 2007 for the filing of the initial case

1 **duplicate of the Ali complaint, including each and every allegation and each cause of**
2 **action,** with the case assigned to the Honorable Susan Illston. On September 28, 2007, Joya
3 personally served her complaint on defendants. On October 16, 2007, defendants answered the
4 complaint.

5 On October 19, 2007, Ali served his complaint via United States mail on defendants. It
6 should be noted that plaintiff filed a proof of service indicating personal service of the complaint
7 on a “Jane Doe” on the fourth floor of Hayward City Hall on September 25, 2007. Defendants’
8 counsel never received the complaint that was purportedly personally served. In the spirit of
9 facilitating the adjudication of the matter, and since defendants already had answered the
10 duplicative complaint in Joya, defendants answered the mail served complaint in the Ali action
11 on October 31, 2007, rather than formally contest service of process. On October 31, 2007,
12 defendants counsel forwarded plaintiff’s counsel in Joya and Ali a stipulation to mediate the
13 dispute and forwarded a draft joint case management conference statement. Again in the spirit of
14 facilitating the adjudication of the matter, rather than waiting until the December 12th deadline,
15 on October 31, 2007, defendants declined to proceed before Magistrate Judge Edward M. Chen.
16 On November 2, 2007, the case was reassigned to the Honorable Charles R. Breyer. On
17 November 7, 2007, at the Court’s request, Ali filed an electronic version of his complaint. After
18 normal business hours, on November 8, 2007 at 5:27 p.m., Ali’s counsel proposed via electronic
19 mail that the within matter be consolidated with Joya v. City of Hayward, with the Ali matter
20 serving as the lead case. Defendants’ counsel was on vacation from November 9 through
21 November 25, 2007. On November 28, 2007, defendants’ counsel advised Ali’s counsel that he
22 is amenable to consolidating the matters with Joya serving as the lead case, with the Honorable
23 Susan Illston presiding. Since defendants did not accept plaintiff’s proposal, Ali’s counsel
24 characterized defendants’ decision to not proceed before a Magistrate as improper “forum
25 shopping”. To the contrary, plaintiff appears to be engaged in impermissible “judge shopping”.

26 _____
27 management conference statement.

1 See Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998) [Court has the inherent
 2 power sua sponte to impose sanctions upon plaintiffs for improper “judge shopping”, including
 3 dismissal of the action in the exercise of its discretion]. In this regard, the Court may consider
 4 the five factor test set forth in Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986) before
 5 resorting to dismissal. Here, plaintiffs Ali and Joya voluntarily chose to file separate duplicative
 6 complaints on successive days in the same San Francisco Division, resulting in delays, and a
 7 waste of Court and City of Hayward resources. Certainly, this action runs counter to the public’s
 8 interest in expeditious litigation. Thus, the first factor favors dismissal. Second, the Court’s
 9 ability to manage its docket was impaired by the plaintiffs’ filing of two identical complaints
 10 under different names. Defendants defer to the Court’s judgment as to how much of the Court’s
 11 valuable time or whether or not serious disruptions were created by plaintiffs’ conduct. Even if
 12 large amounts of the Court’s time were not wasted, and serious disruptions to the Court’s
 13 schedule did not occur, the second factor would at least “(weigh) in favor of the sanction but not
 14 heavily.” Hernandez, 138 F.3d at 399 quoting United States ex rel. Wiltec Guam, Inc. v. Kahaluu
 15 Const. Co., Inc., 857 F.2d 600, 603 (9th Cir. 1988) As to the third factor, at this early juncture it is
 16 difficult to assess what prejudice defendants may have suffered by plaintiffs’ “judge-shopping”.
 17 Nevertheless, defendants reserve the right to address this factor in the future in the event that the
 18 issue becomes more clearly framed. In regards to the fourth factor, public policy favors
 19 disposition of cases on their merits, especially in regards to civil rights matters. Eldridge v.
 20 Block, 832 F.2d 1132, 1137 (9th Cir. 1987). Fifth, the availability of less drastic alternatives most
 21 likely counsels against dismissal of both actions. Rather, other cases involving “judge-shopping”
 22 suggest alternative sanctions such as dismissal of the second action only [see Telesco v. Telesco
 23 Fuel & Mason’s Materials, Inc., 765 F.2d 356, 360 (2d Cir. 1985)] or a stay of the second action
 24 pending resolution of the first action. [see Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d
 25 1197, 1204 (2d Cir. 1970)] In any event, neither plaintiff should be able to benefit from their
 26 gamesmanship by obtaining their preferred judge of choice.

27 Accordingly, defendants respectfully request that the Court sanction plaintiffs

1 appropriately for their “judge-shopping” and that if any portion of the action(s) should remain
2 that it is adjudicated by a judge that is not plaintiffs’ preferred judge of choice.

3 DATED: December 12, 2007

By: MICHAEL J. O'TOOLE, City Attorney
/s/

4 RANDOLPH S. HOM,
5 Assistant City Attorney
6 Attorneys for Defendants
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